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In The Supreme Court of the United States

ROYA RAHMANI, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Joseph Onek
Sharon Bradford Franklin
THE CONSTITUTION PROJECT
1025 Vermont Avenue, N.W.
3rd Floor
Washington, D.C. 20005
(202) 580-6928

Counsel for Amicus Curiae
The Constitution Project

Bruce Fein
Counsel of Record
BRUCE FEIN & ASSOCIATES
910 17th Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 775-1776

Counsel for Amicus Curiae
The Constitution Project

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

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The Constitution Project respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

The Constitution Project is an independent public policy organization that promotes and defends constitutional safeguards. The Project creates bipartisan coalitions of respected political and other leaders who issue consensus recommendations for policy reforms. After September 11, 2001, the Project created its Liberty and Security Initiative, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties even as we work to enhance our Nation's security. The Initiative develops policy recommendations on such issues as the use of military commissions and governmental surveillance policies, which emphasize the need for all three branches of government to play a role in safeguarding constitutional rights.

In July 2003, the Initiative released a *Report on First Amendment Issues*. The report urges that in formulating anti-terrorism measures, the federal government should continue to promote openness, robust political dialogue, and freedom of association. The Liberty and Security Initiative is currently examining the civil liberties problems that result from prosecutions of people for providing "material support" to terrorists. In addition, the Project's Courts Initiative conducts public education on the importance of an independent judiciary and cautions against legislation or

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, had made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. And their letters of consent have been filed with the clerk.

executive branch practices that would limit the substantive jurisdiction of courts.

STATEMENT OF FACTS

Petitioners are United States citizens and political asylum grantees from Iran. Long before September 11, 2001 and the last few years of attention on the Iranian regime, they solicited monetary donations to an Iranian opposition group dedicated to ousting Iran's ruling Ayatollahs, the People's Mujahedin Organization of Iran (PMOI).[2] The PMOI had been designated as a foreign terrorist organization by the Secretary of State in a truncated administrative proceeding from which Petitioners were excluded and which was later held to be constitutionally deficient by the United States Court of Appeals for the District of Columbia Circuit. Petitioners were indicted in March 2001 for providing material assistance to a designated organization under a federal statute that prohibited them from challenging the validity of the designation. Petitioners were precluded from an opportunity to prove that the PMOI was a bona fide political non-terrorist organization, which would have made their donations protected by the First Amendment. After various proceedings, including a request for en banc review, the indictments were sustained by a panel of the United States Court of Appeals for the Ninth Circuit.

The line between legitimate political activity and support for resistance groups that might be characterized as employing illegitimate tactics is often blurry. That blurriness--coupled with the sweeping scope of the designation criteria and the diverse foreign policy sympathies of Americans--requires exacting procedural

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[2] The PMOI is also referred to as MEK and National Council of Resistance of Iran (NCRI) in court and other legal proceedings.

safeguards to avoid criminalizing a wide swath of legitimate foreign policy speech or association.

The procedures for challenging the State Department's designation of foreign terrorist organizations are woefully deficient, as exemplified by the PMOI's designation. Indeed, they were held constitutionally flawed by the U.S. Court of Appeals for the District of Columbia Circuit. Even with some defects cured by that ruling, judicial review remains perfunctory. No designation has ever been successfully challenged.

The Ninth Circuit sustained the constitutionality of punishing Petitioners with no less than 10 years in prison for donating money to the PMOI. Their donations were made during periods when the PMOI's designations were procedurally infirm. According to the panel, however, the constitutional deficiencies could be cured retroactively for purposes of criminally prosecuting PMOI's donors.

The Ninth Circuit's ruling empowers the government to cut First Amendment corners under the banner of fighting foreign terrorism. It clashes with this Court's prior restraint decisions and invites government to suppress bona fide political speech or association to suit its foreign policy or national security maneuvering, for example, to placate authoritarian regimes by designating groups that oppose them as "terrorist." Accordingly, Judge Alex Kozinski, joined by four colleagues, forcefully dissented from the denial of en banc review of the panel's decision.

1. Congress has authorized the Secretary of State to designate a foreign group as a terrorist organization. The designation immediately makes it a crime to provide donations or other material support or resources to the designated group. 18 U.S.C. § 2339B (2000). Thus, once a designation is made, associating in a non-trivial way with the

designated group (e.g., providing expert assistance or advice) is punishable as a felony.

The designation process is denuded of customary procedural safeguards to insure accurate distinctions between constitutionally protected political activity and constitutionally unprotected terrorism. 8 U.S.C. § 1189. A designated organization is denied both notice and an opportunity to be heard. The Secretary may rely upon undisclosed classified information, hearsay, newspaper articles, CNN, Al Jazeera or any other source in making a designation.

2. The PMOI was first designated by the Secretary as a foreign terrorist organization in 1997 in what was admitted by the then administration as an olive branch to what it hoped was a more moderate Iranian regime at the time. Petitioners had no right to challenge the constitutionality of the designation. The PMOI, however, sought review of its designation in the United States Court of Appeals for the District of Columbia Circuit in PMOI v. United States Department of State (PMOI I), 182 F.3d 17 (D.C. Cir. 1999) The D.C. Circuit concluded that the Secretary's designation was neither arbitrary, nor capricious, nor an abuse of discretion, nor did it lack support in the administrative record taken as a whole or in classified information submitted in camera. The designation thus passed muster under the narrow statutory standards for review which are akin to those applied under the Administrative Procedure Act. Speaking for the Court, Judge Randolph, acknowledged that the designation might be concocted (id. at 23):

> For all we know, the designation may be improper because the Secretary's judgment that the organization threatens our national security is completely irrational, and devoid of any support. Or her finding about national security may be exactly correct. We are forbidden from

> saying. That we cannot pronounce on the question does not mean that the Secretary was right. It means we cannot make any assumption, one way or the other.

The court also concluded that the PMOI lacked any constitutional rights because it lacked a United States presence. Id. at 22. It noted that the highly abnormal and skewed administrative proceedings and record favoring the government made judicial review of designations largely pro forma:

> But unlike the run-of-the-mill administrative proceeding, here there is no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to the entity affected by the Secretary's internal deliberations. When the Secretary announces the designation, through publication in the Federal Register, the organization's bank accounts in the United States become subject to seizure and anyone who knowingly contributes financial support to the named entity becomes subject to criminal prosecution. Any classified information on which the Secretary relied in bringing about these consequences may continue to remain secret, except from certain members of Congress and this court. There is provision for 'judicial review' confined to the material the Secretary assembled before publishing the designation. (citations omitted). Id. at 18.

The Court emphasized, however, that the constitutional rights of would-be donors like Petitioners might be distinguishable from the rights of the designated organizations (id. at 22, n.6): "Because the issue is not before us, we do not decide whether section 1189 deprives those in the United States of some constitutional right if they are members of, or wish to donate money to, an organization designated by the Secretary."

3. The Secretary redesignated the PMOI as a foreign terrorist organization in 1999. The designation included the National Council of Resistance of Iran (NCRI) as a PMOI "alias." The NCRI had a United States presence. The PMOI/NCRI sought review in the D.C. Circuit in NCRI v. Department of State, 251 F.3d 192 (D.C. Cir. 2001) ("PMOI II"). The court entertained and sustained a constitutional due process challenge to the one-sided designation procedures.

It held that notice must be given by the Secretary to entities scheduled for designation; non-classified information bearing on the designation decision must be disclosed; the entities slated for designation must be given an opportunity to respond, at least in writing; but classified information may be denied them. Id. at 197.

4. The Secretary reaffirmed the 1999 designation in late 2001 using the upgraded procedural safeguards required by PMOI II. The designation was applied retroactively to 1999, even though the first constitutionally valid listing of the PMOI came approximately two years later. The PMOI again appealed, and the Court of Appeals for the District of Columbia Circuit again sustained the Secretary, including the retroactive 1999 designation. People's Mojahedin Organization of Iran v. Department of State ("PMOI III"), 327 F.3d 1238 (D.C. Cir. 2003).

5. On March 13, 2001, Petitioners were indicted in the Central District of California for allegedly providing financial support to the PMOI from October 8, 1997 through February 27, 2001, for example, by soliciting donations at Los Angeles International Airport. Pet. App. 37a. Petitioners were precluded from defending on the ground that the PMOI had been incorrectly listed as a foreign terrorist organization, which, if true, would make its donations constitutionally protected speech or association. 8 U.S.C. § 1189(a)(8)(2000).

6. The District Court dismissed the indictments on the theory that the designations of the PMOI that served as the predicates of the criminal prosecutions were constitutionally infirm, Pet. App. 36a, but a unanimous panel of the United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 15a.

7. The panel denied that the retroactive designation by the Secretary violated due process. It further concluded that the First Amendment did not guarantee Petitioners an opportunity to prove that the PMOI was a legitimate, non-terrorist organization as a defense. Speaking for the court, Judge Kleinfield reasoned that the PMOI's designation by the Secretary subject to very limited judicial review at the behest of the designated entity was binding on the Petitioners regarding their First Amendment claims of a right to donate. The court denied the applicability of this Court's prior restraint doctrines announced in Freedman v. Maryland, 380 U.S. 51 (1965) and McKinney v. Alabama, 424 U.S. 669 (1976) by maintaining, that the government designations of foreign terrorist organizations must be accepted as correct in criminal prosecutions. In other words, there was no need to litigate the First Amendment's protection of the Petitioners' donations because the government had previously found to the contrary in a procedurally slanted administrative proceeding involving another party. The panel insisted that jury trials would be untenable in litigation implicating national security or foreign policy because the Executive is uniquely enlightened in that universe:

> Defendants could be right about the [PMOI]. But that is not for us, or for a jury in defendants' case, to say. The sometimes subtle analysis of a foreign organization's political program to determine whether it is indeed a terrorist threat to the United States is particularly within the expertise of the State Department and the Executive Branch. Juries could not make reliable determinations

> without extensive foreign policy education and the disclosure of classified materials. Nor is it appropriate for a jury in a criminal case to make foreign policy decisions for the United States. Pet. App. 34a.

8. Judge Kozinski, joined by Judges Pregerson, Reinhardt, Thomas and Paez, dissented from a denial of a petition for a rehearing en banc. Judge Kozinski persuasively demonstrated that Petitioners' donations would be protected First Amendment activity if the PMOI's designation was erroneous; and, that the administrative designation process was tantamount to a prior restraint on free speech by conclusively determining before a donation is given to a designated foreign organization that it would fall outside constitutional protection. The opinion further explained that the prior restraint lacked the procedural safeguards mandated by Freedman to avoid suppressing free speech. Finally, it demonstrated that treating the PMOI as the alter ego for Petitioners in challenging the correctness of its designation in the D.C. Circuit and thus foreclosing Petitioners from re-litigating the issue in a criminal prosecution violates the rule of McKinney that criminal defendants enjoy individual rights to establish that their questioned speech or activities were protected by the First Amendment. Judge Kozinski concluded:

> I can understand the panel's reticence to interfere with matters of national security, but the entire purpose of the terrorist designation process is to determine whether an organization poses a threat to national security. Under the Constitution, the State Department does not have carte blanche to label any organization it chooses a foreign terrorist organization and make a criminal out of anyone who donates money to it. Far too much political activity could be suppressed under such a regime. Pet. App. 14a

ARGUMENT

The Ninth Circuit's ill-reasoned decision issued in a post-9/11 world corroborates Justice Oliver Wendell Holmes' dissent in Northern Securities Company v. United States, 193 U.S. 197, 401 (1904):

> Great cases like hard cases make bad law. For great cases are called great, not by their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

No decision of this Court upholds what the Ninth Circuit has ratified: namely, denying criminal defendants their first and only opportunity to defend the legality of their speech or association by demonstrating its First Amendment protection before they are prosecuted and possibly jailed. The closest analogy in support of the Ninth Circuit is Yakus v. United States, 321 U.S. 414 (1944), issued in the midst of World War II in which a defendant prosecuted for violating a maximum price regulation issued by the Office of Price Administration (OPA) was barred from questioning the constitutionality of the regulation as applied to its commercial sales. But Yakus underscored that the defendant himself, unlike Petitioners, had previously enjoyed a fair opportunity to make that challenge both before the OPA and in the United States Emergency Court of Appeals. Further, Yakus implicated only economic and not free speech interests.

The Ninth Circuit's ruling directly contradicts the rationale of both Freedman and McKinney, and the clear

thrust of Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). If left undisturbed, to borrow from Justice Robert Jackson in Korematsu v. United States, 319 U.S. 432, 243 (1943) (concurring opinion), the precedent will lie around like a loaded weapon ready to be employed to suppress free speech under a counter-terrorism flag. For example, it could be used to sustain a government listing of books or websites that will be conclusively held to constitute criminal incitements or material assistance to foreign terrorists and to impose criminal penalties on any person who distributes or financially supports the listed speech. Moreover, the Ninth Circuit's decision could have a substantial chilling effect. Americans would no longer be free to express their diverse views on U.S. foreign policy for fear of criminal prosecution. A case that threatens to plant the seeds of future constitutional mischief deserves review by this Court.

Contrary to the Ninth Circuit, jury determinations of the validity of designations would not compromise intelligence sources or methods. The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III (2001) protects against that evil, and has been successfully invoked in numerous terrorist prosecutions, for example, the 1993 World Trade Center bombing cases. Neither would jury determinations usurp the foreign policy of the Executive Branch, no more so than do prosecutions under the Espionage Act (18 U.S.C. § 783(e)) or the Neutrality Act (18 U.S.C. § 960), both of which require jury assessments of national security or foreign policy questions in deciding on guilt or innocence.

No civilized nation has an interest in suppressing political speech or association for the sake of suppression. Where, as here, the criminal law punishes in a blurry terrain between legitimate political activity and terrorism, the most scrupulous procedural safeguards are required to avert

trampling on First Amendment speech or association. The Ninth Circuit's decision mocks that understanding.

I. THE NINTH CIRCUIT'S DENIAL TO CRIMINAL DEFENDANTS OF THE OPPORTUNITY TO DEFEND THEIR ALLEGED MISCONDUCT AS PROTECTED SPEECH OR ASSOCIATION UNDER THE FIRST AMENDMENT IS UNPRECEDENTED AND CONFLICTS WITH WELL ESTABLISHED PRIOR RESTRAINT DOCTRINES.

Unlike the Ninth Circuit's ruling in this case, this Court has never sustained a criminal prosecution against a defendant who has been denied any current or past opportunity to challenge the constitutionality of the administrative rule or action that serves as the predicate of the indictment.[3] Where First Amendment rights are in play, this Court ruled opposite of the Ninth Circuit in McKinney. This Court's decision in Yakus, although it is not a free speech case, highlights the unprecedented nature of the Ninth Circuit's harsh decree. It threatens to suppress a treasure trove of diverse foreign policy expression that has been an American hallmark.

In Yakus, the Office of Price Administration issued a regulation setting maximum prices at wholesale of specified cuts of beef and veal. The defendant had been afforded sixty days to protest before the OPA, with an opportunity to

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[3] Even Nazis accused of membership in a criminal organization by the Nuremberg Tribunal enjoyed more due process protection than have Petitioners. The Tribunal's charter authorized the declaration of a group or organization as "criminal" in connection with the trial of an individual member. But any member of an organization that the prosecution sought to have declared criminal enjoyed an opportunity to apply to the Tribunal to be heard on the issue, which it could accept or reject. If an organization was declared criminal, that finding was conclusive in prosecuting its members for membership in a criminal organization. Chapter II, Sections 9-10 of the Tribunals' Charter.

present documentary evidence, affidavits, and briefs, and with the possibility of oral argument. The OPA was required to inform any protestant of the grounds for its decision. Judicial review was available in the Emergency Court of Appeals, where additional evidence could be submitted by the protestant. The court had power to review all questions of law, including the question whether the OPA's determination was supported by evidence, and any question of the denial of due process or any procedural error that had been appropriately raised in the course of the proceedings. The OPA was not permitted to rely on secret evidence.

In these circumstances, the Court declared that the defendant could be foreclosed from belatedly challenging the constitutionality of the maximum price regulation in a criminal prosecution. The Court elaborated: "No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court." Yakus, 321 U.S. at 437.

In contrast to Yakus, Petitioners in this case have never had an opportunity to challenge the correctness of the PMOI's designation, which serves as the predicate of their indictments. They were never given notice or an opportunity to present evidence in the Secretary's process. Moreover, the reliability of the Secretary's designation is highly suspect because the procedures, including the use of secret information and anonymous sources, invite error. "The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and corrupt to play the role of informer undetected and uncorrected." United States ex rel Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950), (Hand, J., Dissenting opinion). The Ninth Circuit failed to cite a single case by either this Court or any inferior court that has ever

upheld a criminal prosecution in which a defendant was foreclosed from presenting a First Amendment defense which he had had no previous opportunity to litigate.

Moreover, the Ninth Circuit's decision clashes head on with McKinney. There Alabama denied a defendant charged with selling obscene material an opportunity to disprove its alleged obscenity. The material, however, had been declared obscene in a prior civil judicial proceeding to which the defendant was not a party. This Court, speaking though Chief Justice Rehnquist, declared that the First Amendment required that the criminal defendant be given the opportunity to contest the obscenity characterization:

> It is undisputed that petitioner received no notice of the Mobile Circuit Court equity proceeding, and that he therefore had no opportunity to be heard therein regarding the adjudication of the obscenity vel non of New Directions...There is nothing in the opinion of the Supreme Court of Alabama indicating that petitioner had available to him any judicial avenue for initiating a challenge to the Mobile declaration as to the obscenity of New Directions. Decrees resulting from in rem proceedings initiated under Chapter 64A of the Alabama Code could in some cases therefore have the same effect as would the ex parte determination of a state censorship authority which unilaterally found material offensive and proscribed its distribution. Such a procedure, without any provision for subsequent re-examination of the determination of the censor, would clearly be constitutionally infirm. McKinney, 424 U.S. at 674.

Petitioners' case is more compelling than that of the defendants in McKinney because they seek to protect legitimate political speech or activity of a higher First Amendment order. As the Court held in Young v. American Mini Theatres, 427 U.S. 50, 71 (1976), adult materials like

those in McKinney are of marginal First Amendment importance, whereas the political activities at issue here are at its core. Moreover, the government's designation of the PMOI as a foreign terrorist organization in a truncated administrative proceeding rather than a judicial proceeding featuring customary procedural protections was held by the Ninth Circuit to be conclusive in a criminal prosecution on the question of whether Petitioners' donations were legitimate political contributions. Yet Petitioners enjoyed no opportunity to participate in the designation proceedings. The PMOI was not their alter ego. Further, the court pointed out in PMOI I that judicial review of a designation at the behest of a designated organization is perfunctory. Additionally, the PMOI may have been handicapped in litigating. The time for appeal was short. It may have lacked the resources to litigate effectively. It may have cared less about the designation than Petitioners either because the PMOI was not confronting a criminal prosecution or because their assets or support base in the United States were not great enough to justify a maximum litigating effort.

Finally, the designation process authorized by Congress is indistinguishable from the putative state censorship authority condemned by the Court in McKinney. The Secretary makes virtual ex parte determinations that designated organizations are not genuine political organizations engaged in protected First Amendment activity and proscribes American citizens from making donations with no provision for subsequent re-examination at the behest of indicted donors.[4] The statute's reach is sweeping, and terrorism is defined to include any threat to use an explosive device or firearm (or, as amended, any "weapon or dangerous device" such as a knife or blunt instrument see 8

[4] The only findings of the Secretary subject to judicial review are whether the designated organizations are "foreign" and that they "engage[ ]in terrorist activity." PMOI I, 182 F.3d 17, 22 (D.C. Cir. 1999).

U.S.C. § 1182(3)(B)(iii)) to damage property anywhere in the planet, unless for personal monetary gain. Pet. App. 72A. As the D.C. Circuit found in PMOI I, judicial review of the Secretary's designation decisions is more ceremonial than substantive:

> We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging. PMOI I, 182 F.2d at 25, (D.C. Cir. 1999).

Under the rationale of the Ninth Circuit, Congress could enact a law empowering the Secretary to prepare an Index of Forbidden Books and Websites that conclusively determined that the materials on the Index constituted criminal incitements to violence not free speech (an often blurry distinction)[5] for purposes of criminal prosecutions against distributors. Such a statute is precisely what McKinney declared would be constitutionally infirm in the context of distributing obscenity, which hangs on the lowest rung of the First Amendment.

The Ninth Circuit seemed to distinguish McKinney from Petitioners' case by insisting that juries are ill-equipped to second-guess foreign policy determinations of the Executive Branch. It further insisted that a jury trial over the

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[5] NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

correctness of a designation would require the disclosure of classified information. Those distinctions do not wash. CIPA has operated for years to enable criminal trials implicating national security issues to proceed while protecting classified information. Then head of the Justice Department's Criminal Division, Michael Chertoff, testified before the Senate Judiciary Committee to that effect.[6] Prosecutions under the Neutrality Act, *supra,* require the jury to determine, *inter alia,* what is a military expedition or enterprise and whether a nation is at peace with the United States. Espionage Act prosecutions under 18 U.S.C. § 793(e), require juries to determine what is "national defense information," and whether its publication can be used "to the injury of the United States or to the advantage of any foreign nation." Further, even a jury finding against the Secretary's designation in a criminal case would not substantially frustrate the foreign policy of the United States. The finding would not create an estoppel against the government in other proceedings involving different parties. United States v. Mendoza, 464 U.S. 154 (1984).

Also undermining the Ninth Circuit's analysis is the fact that an errant designation defense is already available in civil injunction actions to enjoin donations to a designated organization. Pet. App. 61a. Finally, under the Ninth Circuit's reasoning, Congress could deny defendants in section 1189 prosecutions the right to dispute whether their assistance to a designated organization was "material" within the meaning of the statute on the theory that only the Executive Branch holds the expertise to distinguish between what is trivial and what is significant for a particular designated foreign terrorist organization. But this Court has insisted that neither war nor national security is a blank

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[6]DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, United States Senate Committee on the Judiciary, November 29, 2001 available at http://judiciary.senate.gov/print_testimony.cfm?id=126&wit_id=66

check for the Executive Branch. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

The contemporary fear of international terrorism, spiked by the 9/11 abominations, has provoked a political reaction comparable to the post-World War II alarms over Communism, which degenerated into McCarthyism. In PMOI I, the D.C. Circuit found a similarity between the Secretary's process for listing designated foreign terrorist organizations and the Attorney General's process for listing communist organizations which this Court found legally deficient in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). PMOI I, 182 F.3d at 22 (D.C. Cir. 1999). This Court properly blunted efforts by Congress or the Executive to shortchange the First Amendment or other fundamental constitutional rights in the name of fighting international communism.[7] It should similarly serve as ballast between national security and the First Amendment in a post-9/11 world.

II. THE HIGHLY PREJUDICIAL PROCEDURES EMPLOYED BY THE SECRETARY TO JUSTIFY DESIGNATING GROUPS AS FOREIGN TERRORIST ORGANIZATIONS AS OPPOSED TO LEGITIMATE POLITICAL ASSOCIATIONS FAILS THE FIRST AMENDMENT DEMAND FOR EXACTING PROCEDURAL SAFEGUARDS WHEN THE LINE BETWEEN CONSTITUTIONALLY PROTECTED AND UNPROTECTED SPEECH OR ASSOCIATION IS BLURRY.

Where, as with the PMOI, the line between support for legitimate political opposition, which is protected by the

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[7]See e.g., Yates v. United States, 355 U.S. 66 (1957); Watkins v. United States, 354 U.S. 178 (1957); Scales v. United States, 367 U.S. 203 (1961); Apthecker v. Secretary of State, 378 U.S. 500 (1964); United States v. Robel, 389 U.S. 258 (1967).

First Amendment, and support for terrorism, which is not, is agonizingly elusive, the procedures for drawing that line must be far more demanding than section 1189's charade sustained by the Ninth Circuit. That proposition is even more emphatic when the line drawing forms the predicate of a criminal prosecution for donating to support allegedly unprotected activity.

This Court's decision in Freedman dictates that courts, not administrative agencies, must be entrusted with drawing the line between free speech and unprotected support for terrorism, at least when government swings with the heavy hand of a criminal prosecution. As Freedman explained, agencies driven by political incentives are insufficiently sensitive to First Amendment values. 380 U.S. at 58. That concern is heightened in section 1189 designations because the Secretary's mission is to advance the foreign policy agenda of the United States and the political agenda of the President. Those agendas might tempt her to designate groups opposed to repressive regimes (of which there are many) as a negotiating tactic to win a concession coveted by the United States, for example, a renunciation of nuclear ambitions or an increased supply of oil; or, to designate for the sake of designation to create a desired political appearance of "tough on terrorism." The latter type of incentive may have been at work in the United States' mistaken identification of Syrian Canadian Mahar Arar as a terrorist and his deportation to Syria, where he was tortured.[8] In other words, there is a high risk of error in the Secretary's designations that stem from foreign policy or domestic political objectives.

The adverse free speech consequences are major. The definition of foreign terrorist organization enables the

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[8]*See* Ian Austen, "Canadians Fault U.S. for Its Role in Torture Case," N.Y. Times, Sept. 19, 2006.

Secretary to designate any group that she finds is "foreign" and has engaged in "terrorist activity," the latter term reaching the threat to use a firearm or explosive (and, as amended, even a knife or blunt instrument) anywhere on the planet to damage property other than for personal gain. Moreover, the Secretary's national security determination is not subject to judicial review. Under that broad definition, the Secretary can designate virtually any foreign resistance group as terrorist, and thus criminalize the contributions or other material support American citizens would give to advance its legitimate political objectives. The potential impact on free speech is troublesome. United States citizens feature a rich array of backgrounds and foreign policy views. That has always been a source of pride. Yet under section 1189, this wonderfully diverse collection of free speech (which is often unavailable in the home countries of the speakers) can be suppressed at the whim of the Secretary, either as a foreign policy tactic or to make the Administration appear unrelenting in opposing terrorism.

The suppression problem is compounded by the proverbial "chilling effect" engendered by the opaque meaning of "material" assistance. It arguably includes any type of expression or advice that might boost the morale or negotiating skills of a designated organization. Citizens will choose silence over any expression near the line of material assistance to avoid the prospect of an FBI inquiry, a grand jury investigation, or an indictment, which would cause them great expense and psychological trauma.

Contrary to the Ninth Circuit, judicial review of national security or foreign policy determinations of the Secretary would not be problematic. Courts review the correctness of classification decisions of the Executive Branch under the Freedom of Information Act. 5 U.S.C. § 552(a)(1). They do the same in reviewing the Executive Branch's pre-publication vetting of books authored by former employees,

Alfred Knopf v. Colby, 509 F.2d 1362 (4th Cir. 1975), and in determining whether to enjoin the publication of classified information or restricted data under the Atomic Energy Act obtained by the press, New York Times v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring opinion); United States v. The Progressive Inc., 486 F. Supp. 5 (W.D.Wis. 1979). Indeed, Congress itself in enacting 8 U.S.C. § 1189 chose to permit courts to review the national security findings of the Secretary regarding designated organizations in civil injunction actions brought by the government to enjoin donations. In other words, to conclude that the First Amendment requires that donors to a designated organization be offered an opportunity to pursue de novo review in an Article III court to dispute the accuracy of the designation would be neither novel nor unworkable. And it is pivotal to protecting a rich universe of time-honored freedom of expression.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH ONEK
SHARON BRADFORD FRANKLIN
THE CONSTITUTION PROJECT
1025 VERMONT AVE. N.W.
3RD FLOOR
WASHINGTON, D.C. 20005
(202) 580-6928

BRUCE FEIN
BRUCE FEIN & ASSOCIATES
910 17TH STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20006
(202) 775-1776

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